Supreme Court, U.S.
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No. 96-2022

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

EMILY HUDSON, by and through
her parent, SHARON HUDSON,

Petitioner,

v.

BLOOMFIELD HILLS PUBLIC SCHOOLS and
MICHIGAN DEPARTMENT OF EDUCATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER PETITIONER HAS ESTABLISHED THE EXISTENCE OF A CONFLICT AMONG THE CIRCUITS ON THE RULE APPLICABLE IN SPECIAL EDUCATION CASES WHERE THE DISPUTE FOCUSES ON THE LOCATION OF A DISABLED STUDENT'S "HOME SCHOOL"?

II. WHETHER PETITIONER HAS ESTABLISHED THE EXISTENCE OF A CONFLICT AMONG THE CIRCUITS ON THE RULE APPLICABLE IN MAINSTREAMING CASES IN GENERAL?

III. WHETHER PETITIONER HAS ESTABLISHED UNCERTAINTY OR NONCOMPLIANCE WITH THE MAINSTREAMING PROVISION OF THE INDIVIDUALS WITH DISABILITIES IN EDUCATION ACT?

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

"The purposes of this title are -- to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living...." 20 USC § 1401(d)(1)(A).

"The term 'special education' means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including -- instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings ...." 20 USC § 1402(25)(A).

"A State is eligible for assistance under this part for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:

***

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 USC § 1412(a)(5)(A).

"Each public agency shall ensure that:

(a) The educational placement of each child with a disability --

(1) Is determined at least annually;
(2) Is based on his or her IEP; and,
(3) Is as close as possible to the child's home.

(b) The various alternative placements included at Sec. 300.551 are available to the extent necessary to implement the IEP for each child with a disability.

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.

(d) In selecting the LRE [least restrictive environment], consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs." 34 CFR § 300.552.

SUMMARY OF ARGUMENT

This case involves a relatively minor dispute between a parent and a school district concerning the education of a severely disabled student named Emily Hudson. The parent and the school district agreed that Emily was severely disabled. The parent and the school district agreed that Emily had significant educational needs. The parent and the school district agreed that Emily should spend part of each school day in special education and part of each school day in regular education with nondisabled students. The parent and school district agreed which supplementary aids and services would be necessary when Emily was in the regular education environment. The parent and the school district even agreed how much time Emily should spend in special education as opposed to regular education. However, the parent and the school district did not agree which of the district's two middle schools Emily should attend. The parent wanted Emily to attend East Hills Middle School because it was the school Emily would attend if she were not disabled. The school district wanted Emily to attend West Hills Middle School, a short bus ride away, because it was the school where her special education class was located.

The parent requested a due process hearing to resolve the disagreement about which school Emily should attend. At the hearing, and in the subsequent appeals, the parent requested one of two forms of relief. First, the parent asked that the school district be directed to replicate the West Hills special education classroom at East Hills at substantial cost to the district. Alternatively, the parent asked that the school district be directed to provide Emily with an admittedly inferior educational program at East Hills because it is the school she would attend if she were not disabled. The parent's requests were rejected at two levels of administrative review, by the District Court and, most recently, by the Sixth Circuit. These administrative and judicial tribunals uniformly held that, based on the record created at the due process hearing, the Individuals with Disabilities in Education Act (IDEA), 20 USC §§ 1400, et seq., did not require the school

district to replicate expensive special education programs at each home school in the district or, alternatively, require the school district to provide Emily with an inferior educational program at her home school.

The parent, in response, has, by turns, disregarded the facts developed in the extensive administrative record and attempted to create issues where none exist. This was not, for instance, a case about mainstreaming or inclusion. The parties basically agreed how much time Emily should spend in special education as opposed to general education. This was also not a case about supplemental aids and services. The parties agreed which supplemental aids and services were necessary when Emily was in the regular education environment. This was not a case about which proposal for Emily's education was superior. The parent admitted that the district's proposal was superior. This was a case about whether the parent could force the district to educate Emily at the school she would attend if she were not disabled.

The IDEA and its regulations are clear, and the Circuit Courts are unanimous, that the location of a disabled student's home school is only one factor among many a public school districts should consider when making an educational placement under IDEA. The District Court and the Court of Appeals so held in this case and, furthermore, held that the administrative record compelled the conclusion that Emily's home school was not the correct placement for her, given the nature of her disability. The school district submits that there is no reasonable argument to the contrary and, therefore, no basis for this Court to grant the Petition.

STATEMENT OF THE CASE

I. FACTS

A. Introduction And Background

Petitioner is Emily Hudson, through her mother, Sharon Hudson. Emily is a severely disabled student (now 15 years old) who lives in Bloomfield Hills, Michigan. Respondent is the

Bloomfield Hills School District (hereinafter "the School District"). The School District services approximately 5,600 students in two high schools, three middle schools and six elementary schools.

The School District provides special education and related services to eligible students pursuant to IDEA and corresponding Michigan law. There are about 650 eligible students in the District. The vast majority of these students receive special education and related services with students who are not disabled in the District's regular, general education program. The District also operates four special education basic classrooms for students whose disabilities require more intensive and specialized educational programs (Petitioner's Appendix, p. 8a-9a). There is one pre-school basic classroom, two elementary basic classrooms and one middle school basic classroom. The middle school basic classroom is located at the School District's West Hills Middle School and is called "the Learning Center" (Id.).

Emily, as noted, is mentally impaired. She has been identified, with her parent's agreement, as "trainably mentally impaired" (TMI), which means that her level of intelligence is three to four standard deviations below normal. Mich Admin Code R.340.1704. Her IQ is 42 (Id., p. 72a). Emily was first evaluated for special education and related services before she entered school (Id., p. 7a). She was identified as TMI in 1988 and placed in a TMI program in Oakland Schools,[1] just outside the School District. Emily remained in Oakland Schools' program until 1991. The School District conducted an Individualized Educational Planning Committee (IEPC) meeting in May 1991 that reconfirmed Emily's TMI certification and placed her in a basic special education classroom in the School District's Rogers Elementary School. Emily spent approximately five hours a day in the basic classroom and, for the rest of the day, she was

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[1]Oakland Schools is the intermediate school district that serves all school districts and students located in Oakland County, Michigan.

mainstreamed in regular cases with nondisabled students (Id., p. 8a).

Emily reached middle school age during the 1993-94 school year. An IEPC meeting was convened in May 1993 to consider her educational placement for the 1993-94 school year. The Individualized Educational Plan (IEP) from that meeting, dated May 17, 1993, noted that the IEPC considered several placement options. The IEPC considered and rejected the option of placing Emily in general education courses on a full-time basis because that option did not provide Emily with sufficient support given the nature and extent of her disability. The IEPC also considered and rejected the option of placing Emily in a basic special education classroom full-time because that option would not provide Emily enough contact with nondisabled students. A middle option - dividing Emily's school day between the basic special education classroom and regular education - was accepted by the IEPC because it was the "least restrictive environment" (LRE) given her disability and educational needs. This was generally consistent with Emily's placement in elementary school.

Ms. Hudson, Emily's mother, was dissatisfied with the May 1993 IEP because she wanted Emily to attend East Hills Middle School. Therefore, she requested a due process hearing under IDEA and corresponding Michigan law. Dr. Frank Wawrzaszek was appointed by the Michigan Department of Education to serve as the Local Hearing Officer (LHO) at the hearing. The parties avoided a hearing during the 1993-94 school year by agreeing to a trial placement. Under the trial placement, Emily's school day was split between the basic special education classroom at West Hills Middle School and regular education classes at East Hills. This trial placement, however, proved unsatisfactory to both parties (Petitioner's Appendix, p. 64a).

Another IEPC was scheduled following the unsuccessful trial placement. The resulting IEP, dated April 13, 1994 (Respondent's Appendix, pp. 1a-24a), reflected substantial agreement between the School District and Ms. Hudson. The

School District and Ms. Hudson agreed that Emily was properly identified as TMI. There was also complete agreement on Emily's level of academic performance, social abilities and academic and social goals and objectives. For example, the School District and Ms. Hudson agreed that Emily could tell time to the hour and half hour, that she knew the names of coins but was not always accurate and that she did not know when to add, subtract or multiply to answer a simple math problem. The School District and Ms. Hudson agreed to address these deficits by establishing the following goals and objectives: learning to tell time to the nearest five minutes, learning to match money equivalents and coin values and learning to understand when to add, subtract or multiply to solve a math problem (Id., p. 13a).

The IEP noted that the School District and Ms. Hudson agreed that Emily could express ideas verbally but not in writing. This deficit was addressed by shifting away from writing as a method of communication for Emily. Her agreed upon goals and objectives in this area included learning to dictate into a tape recorder and learning to keyboard ideas into a computer to complete a simple sentence (Id., p 14a). The IEP noted, on the other hand, that reading was an area of relative strength (Id., p. 15a). Her agreed upon goals and objectives included increasing her sight word vocabulary, learning the meanings of the words she recognized, improving her ability to pick the right word to fit into a sentence and recalling what she read (Id., pp. 15a-16a).

The School District and Ms. Hudson also agreed to address social and emotional skills. There was agreement that Emily did not demonstrate age appropriate conversation skills and had difficulty with peer relationships (Id., pp. 17a-18a). Emily's goals and objectives in this area included learning to gain attention in an appropriate way, learning to initiate and respond to conversations with other students, learning to ask for help and learning to respect others' personal space (Id.).

The IEPC placed Emily according to the nature of her disability and the goals and objectives to which the School District

and Ms. Hudson had agreed. Emily was placed at the School District's West Hills Middle School where the basic special education classroom for middle school students, the "Learning Center," was located. The IEPC scheduled Emily to spend approximately half of her school day (14.75 hours per 30 hour school week) in the Learning Center. She was scheduled to spend the other half of her school day (13.75 hours) in general education classes with nondisabled students. The remainder of the time (approximately 1.5 hours per week) she was scheduled to receive the following related or "ancillary" services: consultative occupational therapy; direct and consultative social work services; and, consultative speech and language services (Id., pp. 5a-6a).

The IEP noted that the West Hills placement was appropriate for Emily because East Hills Middle School did not have a basic special education classroom and because Emily, given her disability and goals and objectives, would achieve far more in the Learning Center than in a general education placement (Id., pp. 4a-5a). The IEP further noted that, for that half of each school day Emily was in general education, supplemental aids and services were required in the form of a paraprofessional, modified lesson plans and instructional materials, technical support and support from the basic classroom teacher at the Learning Center (Id.).

Ms. Hudson disagreed with the April 1994 IEP and renewed her request for a due process hearing. Ms. Hudson's request for a due process hearing triggered the IDEA's "stay put" provision, 20 USC § 1415(j), requiring Emily to stay put in the mutually unsatisfactory "split-placement" between West and East Hills Middle Schools. There were, however, some mutually acceptable modifications of the split placement as the 1994-95 school year progressed. By the end of the year, Emily was only spending two hours a day in the Learning Center (Id., pp. 26a, 28a). She then took a five minute bus ride to East Hills Middle School where she received, at Ms. Hudson's request, one period of one-on-one instruction at the East Hills Student Center under the supervision of teacher Ms. Sharon DiRezze. She then attended three periods

of classes with nondisabled students at East Hills: social studies, gym and art. Emily received assistance in her regular education classes from a one-on-one paraprofessional, Ms. Janet Tack.

B. The Administrative Hearing And Appeal

The parties agreed that Dr. Wawrzaszek, who had been appointed by the State of Michigan to resolve Ms. Hudson's first request for a due process hearing, would act as the LHO to preside over and resolve her second request for a due process hearing. Dr. Wawrzaszek commenced the hearing by asking the parties to identify their positions. The School District, consistent with the challenged IEP, took the position "... that Emily's educational needs could be best met by a full-time placement at the West Hills Middle School." (Petitioner's Appendix, p. 65a). Ms. Hudson, consistent with her earlier position, stated "... that Emily should attend her home school, East Hills Middle School, for the entire school day." (Id.). The parties were otherwise in substantial agreement about the amount of time Emily should spend in the special education as opposed to general education. The School District took the position that Emily should receive 15.5 to 18.5 hours per week of special education, including 1.5 hours of ancillary services (Id.). Ms. Hudson's position was that Emily should receive "... 1-2 hours per day" (i.e., 5-10 hours per week) in special education, excluding ancillary services (Id.). Ms. Hudson contended that the special education instruction could be provided in the "Student Center" at East Hills.

Dr. Wawrzaszek received evidence and arguments on the parties' positions over five hearing dates between May 19 and 31, 1994. The evidence overwhelmingly supported the School District's position. Emily's teacher at the Learning Center, Ms. Beth Mueller, testified to Emily's academic abilities. Ms. Mueller testified, with respect to mathematics, Emily could tell time to the nearest hour or half hour but could not associate that fact with the need to go somewhere or do something at a particular time. In other words, she did not have a functional understanding of time. Emily could not add the values of different coins. For instance,

if she started counting with a dime she would give all coins the value of ten cents, regardless whether they were pennies, nickels or quarters. Additionally, when presented with a simple story problem, Emily did not know whether to add, subtract or multiply to reach the correct answer. Ms. Mueller's description of Emily's mathematical disabilities was confirmed by East Hills teacher Ms. Sharon DiRezze.

Ms. Mueller testified that Emily's ability to express herself in writing was very limited. She could write her name, address and phone number; although she could not accurately respond to questions about her address, such as "What State do you live in?" and could not accurately spell her address. She could not accurately copy information from the blackboard or from a sheet of paper she was working on. Emily could not accurately write what her teacher dictated. The only way that Emily could write a sentence was if she had practiced it several times. Reading, as noted, was an area of relative strength. Ms. Mueller testified that Emily recognized about 200 words but could not spell them independently and could not find a book page by herself.

In the social and emotional area, Ms. Mueller and Ms. DiRezze testified that Emily's ability to communicate was limited. She did not readily initiate conversations with peers. She was not able to express basic needs, such as the need to find a misplaced book bag or locker key. The communication skills she did exhibit were often maladapted. Emily tended to circle around or bump into a person whose attention she wanted. She also tended to greet others with the stock phrase, "I like your shirt".

Ms. Mueller testified that her classroom at West Hills Middle School, the Learning Center, was the best environment for Emily to achieve her educational goals and objectives. Ms. Mueller testified that she only had twelve students in her class (Id., p. 74a). All of her students were disabled, but the severity of Emily's disability placed her in the lowest quarter of Ms. Mueller's class (Id., p. 74a).

Ms. Mueller testified that the Learning Center was specifically designed to teach students like Emily. There was a low student to teacher ratio. The Learning Center was also staffed by two paraprofessionals, one full-time and one part-time (Id., p. 74a). Ancillary or related services staff (i.e., physical therapist, occupational therapist, speech and language therapist, hearing consultant and autistic consultant) were also located at West Hills where they could readily provide services to Ms. Mueller's students, including Emily (Id., p. 74a). The social worker was also located at West Hills, which allowed her to team teach with Ms. Mueller and, also, pull out students, including Emily, for individual work (Id., p. 74a).

The Learning Center was also equipped to teach students like Emily whose goals and objectives were academically basic. The Learning Center had ovens, kitchen tools, manipulatives, textbooks from lower grades and other materials that allowed mentally impaired students to work toward their goals and objectives in a concrete manner (Id., p. 74a). The Learning Center also permitted Ms. Mueller to teach basic academic skills (e.g., telling time, basic mathematical concepts, reading, etc.), such as those Emily was working on, that were ignored or, at best, became secondary to subject matter at the middle school level (Id., p. 74a).

East Hills Middle School, unlike West Hills, did not have a basic special education classroom. East Hills did have a Student Center. However, the Student Center was operated much differently than the Learning Center and did not provide an appropriate environment for providing direct instruction to students like Emily. Ms. DiRezze, who supervised the Student Center during the 1993-94 school year, testified that the student center served as an educational resource for a wide variety of students; from the gifted and talented, to recent immigrants who needed help with English, to students with normal intelligence who were "at risk" due to specific learning disabilities or emotionally impaired behaviors (Id., p. 74a). Basic classroom instruction was not provided in the Student Center, unlike Ms. Mueller's Learning Center (Id., p. 79a). Additionally, the Student

Center was not equipped, like the Learning Center, with special materials to help mentally impaired students learn their lessons and achieve their goals and objectives (Id., pp. 78a-79a).

Testimony at the hearing further established that the regular education environment was not an environment in which Emily could make academic progress. Ms. DiRezze and Ms. Janet Tack (Emily's one-on-one paraprofessional) both testified that Emily was simply incapable of benefitting from middle school instruction. Emily, because of her mental impairment, could not do middle school math, reading or science. Emily, when she was in a regular education class, worked on different lessons than the other students in the class, a concept known as "parallel instruction" (Id., p. 79a). This resulted in Emily being instructed by her paraprofessional, Ms. Tack, rather than the certified teacher who was teaching the class an entirely different lesson.

The evidence also eliminated any contention that Emily could make more progress toward her social and emotional goals and objectives at East Hills than West Hills. Ms. DiRezze and Ms. Tack both testified that Emily made little or no progress toward her social and emotional goals and objectives at East Hills. Emily was not able to engage in a conversation with regular education students aside from stock and sometimes inappropriate greetings, such as "I like your shirt". Unfortunately, Emily was sometimes teased by the students at East Hills, despite staff's best efforts. Emily did not learn much from modeling the behaviors of nondisabled students. She imitated their behavior occasionally, but not in a productive fashion. Emily made more progress toward her social and emotional goals and objectives at West Hills. She engaged in conversations with other students at West Hills, learned from those conversations and appeared to enjoy herself. Ms. Mueller later testified that Emily had made friends with a regular education student at West Hills during the 1994-95 school year.

Dr. Gerald Freeman, a Professor of Special Education at Oakland University and former Director of Special Education at

Oakland Schools, testified to his opinion about Emily's educational placement and program at the due process hearing.[2] Dr. Freeman observed Emily on several occasions in her split program at East Hills and West Hills. He also spoke with her teachers and paraprofessional and reviewed her school records (Id., p. 77a). Dr. Freeman's testimony strongly supported Emily's placement at West Hills on a full time basis in accordance with the challenged April 14, 1994 IEP. Dr. Freeman noted that Emily's greatest need was to develop the sort of functional skills that would permit her to function as an independent adult after she left school (Id., pp. 77a-78a). Dr. Freeman testified that Emily was developing the necessary skills in Ms. Mueller's class and characterized Ms. Mueller as an excellent teacher (Id., p. 78a). He further testified that Emily was not developing the necessary skills at East Hills, especially when she was attending academically oriented classes where the subject matter was far beyond her intellectual ability (Id., p. 77a).

The evidence offered on Ms. Hudson's behalf was not persuasive. Ms. Hudson testified on her own behalf and called two experts, Mr. Thomas Osbeck and Dr. David Winstrom. These witnesses testified, consistent with Ms. Hudson's view, that Emily should attend East Hills Middle School. Their testimony was discussed in the Local Hearing Officer's Decision (Id., pp. 70a-71a). Notably, Ms. Hudson's witnesses did not dispute the facts to which the School District's witnesses testified. They were also extremely complimentary of the School District's personnel and programs. They simply believed, irrespective, that Emily should be educated at East Hills Middle School because it was the school she would attend if she were not disabled.

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[2]Dr. Freeman's extensive credentials as an expert in the area of special education are described at Petitioner's Appendix, pp. 76a-77a. Dr. Freeman's forty year career has been divided almost equally between practical and academic work with disabled students.

The LHO, reviewing these facts, concluded that Ms. Hudson had not carried her burden of proving that the challenged IEP was inappropriate for Emily (Id., pp. 68a, 81a, 85a, 87a). The LHO went further and concluded that nothing short of replicating the Learning Center at East Hills Middle School would make it an appropriate setting for Emily's educational program. He further noted that the cost of replicating the Learning Center at East Hills for just one student could not be justified (Id., p. 85a). The Affidavit of Dr. William K. Filiatreau, the School District's Director of Special Education, pegged the cost of replicating the Learning Center at $33,500.00 for the first year alone (Respondent's Appendix, pp. 30a-32a).

Ms. Hudson appealed from the LHO's Decision to the Michigan Department of Education. Dr. William Sosnowsky was appointed State Level Hearing Officer (SHO). The issues raised on appeal were whether the LHO had correctly placed the burden of proof on Ms. Hudson and whether the April 1994 IEP was appropriate for Emily. The SHO ruled in the School District's favor on both issues (Petitioner's Appendix, pp. 57a-62a).

C. The Instant Lawsuit And This Petition.

Ms. Hudson filed this lawsuit in the United States District Court for the Eastern District of Michigan on November 15, 1994. The Complaint, as originally pled, alleged four counts arising under IDEA, 20 USC §§ 1400, et. seq. (Counts I and III); Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 USC § 794, (Count II); and the Americans with Disabilities Act of 1990, 42 USC §§ 12101, et seq. (Count IV). Ms. Hudson voluntarily dismissed Counts III and IV with prejudice, leaving Counts I and II. These remaining Counts alleged that the School District violated the "least restrictive environment" provisions of IDEA and Section 504.

The parties filed cross motions for summary judgment at the close of discovery. The District Court -- with the benefit of the entire record, the parties' extensive briefs and oral argument --

denied Ms. Hudson's motion for summary judgment, granted the School District's motion for summary judgment and entered judgment in the School District's favor (Petitioner's Appendix, pp. 4a-51a). The District Court, in an exhaustive written Opinion and Order, reviewed the facts at length (Id., pp. 6a-30a). The District Court noted, in accordance with this Court's decisions, that the standard of review was de novo with "due weight to the state administrative proceedings" (Id., pp. 32a-33a). The District Court further noted, in accordance with uniform Court of Appeals' precedent, that Ms. Hudson bore the burden of proof because she had challenged the IEP (Id., pp. 33a-34a). Then, the District Court, applying the facts to the law, concluded that Ms. Hudson had not carried her burden of proving that the IEP violated the LRE provisions of IDEA or Section 504 (Id., pp. 34a-50a). The District Court also dismissed Ms. Hudson's Section 504 claim on the alternative ground that she had failed to initiate or exhaust available administrative remedies (Id., p. 50a, fn. 17).

Ms. Hudson filed her Claim of Appeal on December 26, 1995. Shortly thereafter, in January 1996, Ms. Hudson withdrew Emily from the School District and enrolled her in a private school (Petition, p. 5). The Court of Appeals for the Sixth Circuit issued its Opinion and Judgment on March 13, 1997 (Petitioner's Appendix, pp. 1a-3a). The Court rejected the School District's argument that Ms. Hudson's decision to withdraw Emily from school in favor of a private school placement mooted the case (Id., p. 30). Turning to the merits, the Court adopted the District Court's opinion as its own (Id.). The mandate issued on April 7, 1997. The instant Petition was filed and served in due course.[3]

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[3]The Petition does not indicate whether Ms. Hudson has any intention of re-enrolling Emily in the School District. However, Emily has not attended school in the School District for almost two full years.

II. ARGUMENT

A. Petitioner Has Not Established A Legitimate Basis For This Court To Grant The Petition For Writ Of Certiorari.

Rule 10 sets forth the relatively unusual circumstances in which this Court grants review by certiorari. The Rule provides, in essence, that review may be granted in four circumstances: when conflicting decisions have been issued on an important federal question between or among federal circuit courts or state courts of last resort; when a federal court or state court of last resort has entered a decision in conflict with this Court's decisions; when this Court's supervisory power should be exercised because a court has departed from the accepted and usual course of judicial proceedings; or, when an important federal question should be settled by this Court. Conversely, certiorari is not typically granted to correct erroneous fact finding or the misapplication of a correctly stated legal principle. Thus, the Rule provides:

> "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceeding, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SC Rule 10.

The Petition in this case advances three arguments in favor of review. First, Petitioner argues that there is a conflict among the Circuits concerning the rule applicable to LRE or mainstreaming cases arising under the IDEA. Second, Petitioner argues that the Sixth Circuit has departed from critical LRE standards. Finally, Petitioner asserts that there is uncertainty and non-compliance with the congressional preference for mainstreaming. None of these arguments is persuasive, particularly on the facts of this case, for the reasons discussed below.

1. Petitioner Has Not Established The Existence Of A Conflict Among The Circuits On The Rule Applicable In Special Education Cases Where The Dispute Focuses On The Location Of The Disabled Student's "Home School".

IDEA requires public schools to educate disabled students in the "least restrictive environment" (LRE). This is sometimes referred to as IDEA's "mainstreaming" or "inclusion" requirement. The classic LRE or mainstreaming case involves a dispute about the degree to which a disabled student will be educated with nondisabled students. For instance, the parents may

wish the disabled student to be educated with nondisabled students for the entire school day or a significant part of the school day while the school district proposes to educate the disabled student exclusively with other disabled students, perhaps at a separate or segregated facility. This case does not involve such a dispute. The dispute here was whether IDEA required the School District to educate Emily at the school she would attend if she were not disabled, her "home school", notwithstanding the availability of a superior educational program six miles away in the same District. There was no dispute about the amount of time Emily would spend with nondisabled students. Thus, this was not an LRE or mainstreaming case, per se, but a home school case. As demonstrated below, IDEA and its implementing regulations are clear that the location of a disabled student's home school is but one of many factors that should be considered in determining the student's educational placement. Furthermore, the Circuits are uniform in their interpretation and application of the law.

The IDEA, under which this case was decided, is a comprehensive statute providing for the "free appropriate public education" of disabled student. 20 USC § 1401(d)(1)(A). IDEA's touchstone is the unique, individual needs of each eligible disabled student. Thus, IDEA provides, in the subsection entitled "Purposes":

> "The purposes of this title are -- to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." Id.

IDEA further, and explicitly, recognizes that the unique, individual needs of eligible disabled students require public schools to make available a wide variety of educational placements. These placements range from full inclusion (i.e., the provision of special education and related services entirely within the regular education environment) to private placements (i.e., the provision of special education and related services entirely outside

the regular education environment), often in completely segregated hospitals or other institutions. Thus, IDEA specifically provides that:

> "The term 'special education' means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including -- instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; ..." 20 USC § 1402(25)(A).

See also 34 CFR § 300.17(a)(1). The key factor that determines which educational placement is appropriate for a particular student is the individual and unique nature of the student's disability and educational needs.

IDEA repeatedly emphasizes the individualized nature of the educational services that constitute a "free appropriate public education" for any particular disabled student. The group that meets to formulate each student's educational place is called the "Individualized" Education Program Team (IEPC). 20 USC § 1414(d)(1)(B), 34 CFR §§ 300.343-345. The educational program or placement developed by the IEPC is called the "Individual" Educational Program (IEP). 20 USC § 1414(d)(1)(A), 34 CFR §§ 300.340 and 300.346. The degree of individualization required by the Act leaves little or no room for the contention that any particular educational program or placement is presumptively appropriate or inappropriate across the wide spectrum of eligible disabled students.

IDEA does require public schools to educate disabled students with nondisabled students to the maximum extent appropriate for disabled students. IDEA does not, however, require school districts to educate disabled students in their home schools (i.e., the school the student would attend if not disabled). The location of the disabled student's home school is merely one factor the IEPC should consider, among many others, to determine where the student's IEP should be implemented.

IDEA does not even use the phrase "home school". IDEA's LRE or mainstreaming provision simply provides that school districts must establish procedures to assure that, to the maximum extent *appropriate*, disabled students are educated with nondisabled students:

> "A State is eligible for assistance under this part for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:
>
> ***
>
> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 USC § 1412(a)(5).

See also 34 CFR § 300.550(b)(1). The word "home" first appears in an administrative regulation. This regulation does not purport to require public schools to educate disabled students at their home schools. The regulation merely states that, unless the IEP provides otherwise, the school district should provide educational services at the school the student would attend if not disabled. 34 CFR § 300.552(c). The school district, in making this decision, must consider the pros and cons of educating the student at another school. 34 CFR § 300.552(d). Thus, the regulation reads as follows:

> "Each public agency shall ensure that:
>
> (a) The educational placement of each child with a disability --
>
> (1) Is determined at least annually;
>
> (2) Is based on his or her IEP; and,

> (3) Is as close as possible to the child's home.
>
> (b) The various alternative placements included at Sec. 300.551 are available to the extent necessary to implement the IEP for each child with a disability.
>
> (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.
>
> (d) In selecting the LRE consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs." 34 CFR § 300.552.

The commentary to 34 CFR 300.552 provides further reinforcement. The commentary again emphasizes that educational programing and placement decisions must be driven by the nature of the student's disability and individualized educational needs:

> "The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to ensure that each child with a disability receives an education that is appropriate to his or her individual needs." 34 CFR § 300.552, note.

The commentary goes on to point out that the location of the disabled student's home school is only one of many factors that should be considered in developing the educational program or placement, strongly suggesting that the location of the home school is not significant at all except as a "tie-breaker" between equally appropriate placement options:

> "... [T]he analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take

> this factor into account in making placement decisions. The parents' right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential [i.e., separate or segregated] program. An equally appropriate education program may exist closer to home; and this issue may be raised by the parent under the due process provisions of this subpart." Id.

The Department of Education Memorandum cited by Petitioner is fully consistent with the foregoing discussion of IDEA and its administrative regulations. The Memorandum explicitly states that "[t]he overriding rule is that each student's placement must be individually-determined based on the individual student's abilities and needs." *OSEP Memorandum 95-9*, 21 IDELR 1152, 1155 (1994) (Petitioner's Appendix, p. 99a). The Memorandum also explicitly states that IDEA, according to its terms, does not require the placement of all disabled students in the regular education environment:

> "IDEA does not require that every student with a disability be placed in the regular classroom regardless of individual abilities and needs. This recognition that regular class placement may not be appropriate for every disabled student is reflected in the requirement that school districts make available a range of placement options, known as a continuum of alternative placements, to meet the unique educational needs of students with disabilities. This requirement for the continuum reinforces the importance of the individualized inquiry, not a 'one size fits all' approach, in determining what placement is the LRE for each student with a disability. The options [on] this continuum must include 'the alternative placements listed in the definition of special education under § 300.17 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions).' 34 CFR § 300.551(b)(1). These options must be available to the extent necessary to implement the IEP of each disabled

> student. The placement team must select the option on the continuum in which it determines that the student's IEP can be implemented. Any alternative placement selected for the student outside of the regular education environment must maximize opportunities for the student to interact with nondisabled peers, to the extent appropriate to the needs of the student." Id., at 1155 (Petitioner's Appendix, p. 98a).

The Memorandum further points out, consistent with the previous discussion, that disabled students should be placed in their home schools "... unless [the] student's IEP requires some other arrangement." Id., at 1154 (Petitioner's Appendix, p. 93a). This is but another way of saying that the location of the student's home school is merely one factor, among many, that should be considered in reaching an appropriate placement decision.

The Circuit Courts that have considered this issue have all held - consistent with IDEA, the regulations and the Department of Education's interpretation - that the location of a disabled student's home school is but one factor the IEPC should consider in developing the student's IEP. The Tenth Circuit undertook the most extensive analysis of this issue in a case virtually identical to the case at bar, *Murray by Murray v. Montrose County School District RE-1J*, 51 F3d 921 (10th Cir 1995), *cert den*, ___ US ___, 116 SCt 278, 133 LEd2d 198 (1995). *Murray* involved a student with cerebral palsy who, initially, attended his home school. The IEPC determined that he would be more appropriately placed at another elementary school that had a specific program for severely disabled students and was located about ten miles from the student's home school. The student's parents requested a due process hearing, in which they contended that IDEA's provisions obligated the school district to educate the student at his home school. The administrative proceedings were concluded in the school district's favor and the district court granted the school district's motion for summary judgment.

On appeal, the Tenth Circuit conducted an in-depth analysis of the same arguments advanced by Petitioner here. The Tenth

Circuit rejected plaintiff's argument that the plain language of IDEA's LRE provision, 20 USC § 1412(a)(5),[4] created a "rebuttable presumption" that the LRE was the disabled student's home school with supplementary aids and services:

> "[Plaintiff's] interpretation strains the plain meaning of the statute. The statute clearly addresses the removal of disabled children from classes or schools with nondisabled children. It simply says nothing, expressly or by implication, about removal of disabled children from neighborhood schools. In other words, while it clearly commands schools to include or mainstream disabled children as much as possible, it says nothing about where, within a school district, that inclusion shall take place." Id., at 928-29.

The Court also rejected plaintiff's argument that the administrative regulation cited above, 34 CFR § 300.552, created a rebuttable presumption in favor of placement at the student's home school:

> "A natural and logical reading of these two regulations is that a disabled child should be educated in the school he or she would attend if not disabled (i.e., the neighborhood school), *unless* the child's IEP requires placement elsewhere. If the IEP requires placement elsewhere, then, in deciding where the appropriate placement is, geographical proximity to home is relevant, and the child should be placed as close to home as possible." Id., at 929.

The Tenth Circuit next addressed, and rejected, plaintiff's contention that legislative history (including the adoption of 20 USC § 1407(b)) dictated a presumption in favor of the home school with supplementary aids and services. The Court noted:

> "With respect to legislative statements surrounding the enactment of the IDEA, they all present the same problem

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[4]Formerly 20 USC § 1412(5)(B).

> for [plaintiff] as the statute: they simply do not clearly indicate that Congress, in discussing mainstreaming or inclusion and the concept of the LRE for each disabled child, meant anything more than avoiding as much as possible the segregation of disabled children from nondisabled children. They in no way express a presumption that the LRE is always or even usually in the neighborhood school." Id., at 929.

Thus, the *Murray* court concluded that "... there is no presumption of neighborhood schooling, either in the IDEA or its implementing regulations." Id., at 930.

The other Circuits that have considered this issue, before and after *Murray*, have reached the same conclusion. The Fourth Circuit, in *Barnett v. Fairfax County School Board*, 927 F2d 146, 153 (4th Cir 1991), *cert den*, 502 US 859 (1991), held:

> "...[W]e do not interpret this section [34 CFR § 300.552] as imposing upon a school board the obligation to place a child in his base [home] school. Rather, this section requires only that a school board take into account as one factor, the geographical proximity of the placement in making these decisions."

Similarly, the Eighth Circuit, in *Schuldt v. Mankato School District No. 77*, 937 F2d 1357, 1361 (8th Cir 1991), *cert den*, 502 US 1059 (1992), stated:

> "The [plaintiffs] argue that the act [IDEA] requires the school district to place [the student] at the school nearest to her home. Their argument misinterprets the act [and] misuses precedent...
>
> ***
>
> We interpret section 300.552 as directing the school district to locate [the student] at a school where her teachers can fully implement her program. The phrase 'as close as

> possible' is not a mandate that the district place [the student] at [her home school]."

Likewise, the Fifth Circuit, in *Flour Bluff Independent School District v. Katherine M.*, 91 F3d 689, 693-94 (5th Cir 1996), *cert den*, ___ US ___, 117 SCt 948, 136 LEd2d 836 (1997) noted:

> "State agencies are afforded much discretion in determining which school a student is to attend. Under the regulations governing the placement of a student in the 'Least Restrictive Environment', a child should attend his or her neighborhood school *unless* the child's IEP requires arrangements that do not exist at that school. In fact, if the child requires such arrangements, the school district has numerous options (public or private) on placing the student. The regulations, not the statute, provide only that the child be educated 'as close as possible to the child's home.' However, this is merely one of many factors for the district to take into account in determining the student's proper placement. It must be emphasized that the proximity preference or factor is not a presumption that a disabled student attend his or her neighborhood school [footnotes omitted]."

See, also, *Poolaw v Bishop*, 67 F3d 830 (9th Cir 1995). The following District Courts have reached the same conclusion. *Fischer by Fischer v. Rochester Community Schools*, 780 F Supp 1142, 1150 (ED Mich 1991); *Urban by Urban v. Jefferson County School District R-1*, 870 F Supp 1558, 1568 (D Colo 1994), *aff'd*, 89 F3d 720 (10th Cir 1996). *Cheltenham School District v Joel P.*, 949 F Supp 346, 352 (ED PA 1996).

Here, in this case, the District Court and the Court of Appeals followed the well-established law. The District Court noted Petitioner's argument that IDEA's LRE provision required Emily's placement at her home school (Petitioner's Appendix, p. 34a). The District Court cited and reviewed the applicable sections of IDEA and its administrative regulations (Id., pp. 34a-

37a). The District Court also cited and analyzed the precedent on point (Id., pp. 37a-40a). Having done so, the District Court concluded that the location of Emily's home school was but one factor the IEPC should have considered in selecting her educational placement:

> "This Court agrees with these interpretations of the IDEA statute and regulations. Contrary to Plaintiff's contentions, nothing in the statute or regulations requires a school district to in every instance place a child in the neighborhood school that he/she would attend if not handicapped. As the Tenth Circuit observed in *Murray* [supra], a natural and logical reading of the statute and regulations is that education in the neighborhood school is preferred unless the child's needs require placement elsewhere. It is at the point where placement is required elsewhere that a school district must place the child in such an alternate placement 'as close to home as possible.' The Bloomfield Hills School District has complied with this requisite." (Id., p. 40a-41a).

The Sixth Circuit adopted the District Court's analysis and statement of the law as its own (Id., p. 3a).

As discussed, the District Court and the Sixth Circuit followed the law and well-established uniform precedent. Therefore, the School District submits that there is no basis for this Court to exercise its discretion to accept the Petition.

2. Petitioner Has Not Established The Existence Of A Conflict Among The Circuits On The Rule Applicable In Mainstreaming Cases In General.

Petitioner states, without any explanation or analysis, that there is a split among the Circuits regarding the applicable legal standard for determining compliance with IDEA's LRE provision (Petition, pp. 7-8). The School District will not attempt to guess

to what Petitioner is referring. The School District will, however, make two points in response.

First, Petitioner took the opposite position in the Court of Appeals. There, Petitioner maintained that there was no significant difference in the verbal formulations the Circuits had articulated for reviewing school district compliance with IDEA's LRE requirement and, furthermore, that the test used in the Sixth Circuit was fully consistent with the Act's LRE requirement. Specifically, Petitioner's appellate brief included the following statements:

> "*Roncker* [*v. Walter*, 700 F2d 1058 (6th Cir 1983)][5] ... can be reconciled with the statutory and regulatory standards outlined above." (Respondent's Appendix, p. 28a).
>
> ***
>
> "*Roncker* is cognizant of core Congressional policy, finding that placement in the least restrictive environment is a 'very strong congressional preference.' Id. at 1063. More specifically, the standards developed in *Roncker* can be reconciled with the language of the regulatory scheme..." (Id.).
>
> ***
>
> "... [T]he *Roncker* test ... has proven to be an adaptable tool, as its standards are flexible enough to extend to new factual situations in which one party is seeking an educational placement in regular education. *** Thus, a wide variety of LRE cases can be brought within the *Roncker* framework." (*Id.*, pp. 28a-29a).

Thus, Petitioner's dissatisfaction with *Roncker* and, the related contention that *Roncker* is inconsistent with IDEA or precedent from other Circuits, is newly discovered.

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[5]*Roncker* is the leading LRE or mainstreaming case in the Sixth Circuit.

Second, this case is not a typical mainstreaming or LRE case. There was no dispute between Ms. Hudson and the School District about the amount of time Emily should spend in the regular education environment with nondisabled students. The parties stated their positions on the subject prior to the due process hearing. Ms. Hudson's position was that Emily should spend "... 1-2 hours per day" (i.e., 5-10 hours per week) in special education, excluding related or ancillary services (Petitioner's Appendix, p. 65a). The School District's position was that Emily should spend "15.5 to 18.5 hours per week" in special education, including related services (Id.). Thus, at the beginning of the hearing, the parties' positions differed by approximately one hour a day when time devoted to related services was factored out.[6]

The parties' minimal difference about the amount of time Emily should spend in regular education further narrowed, and then vanished, between the beginning of the due process hearing and appeal to the District Court. By that time, Emily was in Ms. Mueller's special education class at West Hills Middle School from 8:30 a.m. to 10:40 a.m., including time devoted to related services (Respondent's Appendix, pp. 26a, 28a). Thus, adjusting for related services, Emily was actually spending less time in special education and, conversely, more time in the regular education environment that Ms. Hudson had initially proposed. There was simply no disagreement about the amount of time Emily should spend in the regular education environment. The issue, as noted above, was the school building in which Emily's program would be provided: West Hills or East Hills.

The cases to which Petitioner has directed this Court in support of the proposition that a conflict exists among the Circuits all involved the typical mainstreaming or LRE dispute about the amount of time a student should spend in general education. They did not involve the "home school" subject at issue in this case. The Fifth Circuit's decision in *Daniel R. v. El Paso Independent*

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[6]The challenged IEP called for Emily to receive 1.5 hours of related services per week (Respondent's Appendix, p. 6a).

School District, 874 F2d 1036 (5th Cir 1983), *cert den*, 464 US 864 (1983), did not involve a controversy about the student's home school. The Fifth Circuit identified the parties' positions as follows:

> "[The parent] wanted [the school district] to place Daniel in pre-kindergarten -- a half day, regular education class.
>
> ***
>
> Under the [school district's] placement, Daniel would attend only the special education, early childhood class; would eat lunch in the school cafeteria, with non-handicapped children, three days a week if his mother was present to supervise him; and would have contact with non-handicapped students during recess." Id., at 1039.

Similarly, the Eleventh Circuit's decision in *Greer v. Rome City School District*, 950 F2d 688 (11th Cir 1991), did not turn on the location of the student's home school. The parent did request that the student receive educational services at her neighborhood school. However, the Court did not consider this a salient factor in its analysis. Id., at 696-99. The Third Circuit's decision in *Oberti v. Board of Education of the Clementon School District*, 995 F2d 1204 (3rd Cir 1993) is, likewise, distinguishable. *Oberti*, like *Daniel R.* and *Greer*, had to do with the amount of time the student would spend in regular education with nondisabled students. The Court's analysis did not even take into account the parents' request to have the student educated in his neighborhood school. Id., at 1220-24. Finally, the Ninth Circuit's decision in *Sacramento City Unified School District v. Rachel H.*, 14 F3d 1398 (9th Cir 1994), *cert den*, ___ US ___, 114 SCt 2679, 129 LEd2d 813 (1994), like the other cases cited by Petitioner, did not involve a home school dispute. Rather, the issue was (again) the amount of time the student would spend with nondisabled students in regular education.

The School District notes - in connection with the distinction between classic LRE cases and home school cases - that at least one Circuit has declined an invitation to confuse the issues. The

Tenth Circuit, in *Murray*, was confronted with a home school dispute in which the parents requested an advisory opinion on the standard that Court would apply to future cases. The Tenth Circuit properly refused:

> "The [parents] ask us to select an LRE standard from those proposed thus far by other circuit courts. We need not adopt an LRE compliance standard in order to decide this case, and we therefore choose not to do so. This is so because we have held that the LRE mandate does not include a presumption of neighborhood school, and a school district accordingly is not obligated to fully explore supplementary aids and services before removing a child from a neighborhood school. It is only so obligated before removing a child from a regular classroom with nondisabled children. The [parents] have never objected to the degree to which [the student] was educated outside the regular classroom; they only challenge his removal from his neighborhood school. We therefore need not decide which standard this circuit would apply to determinations of whether the LRE requirement of section [1412(a)(5)] has been met." Id., at 930.

There is no confusion in the law and no split among the Circuits concerning the standard applicable to a parent's desire to have a disabled student educated in his or her home school. There are different verbal formulations of the standard applicable to other types of mainstreaming or LRE cases but, as Petitioner has already conceded, the standard articulated by the District Court in this case and adopted by the Sixth Circuit, was fully consistent with IDEA's letter and spirit. Accordingly, the School District submits that Petitioner has not provided this Court with an adequate basis to exercise its discretion to grant the Petition.

3. Petitioner Has Not Established The Existence Of Uncertainty Or Noncompliance With IDEA's Mainstreaming Provision.

Petitioner states, without explanation, that uncertainty or noncompliance exists with respect to IDEA's LRE or mainstreaming provision. This argument was not raised below and should not be considered by this Court for the first time. Furthermore, Petitioner presents absolutely no factual or legal support for this argument. Moreover, Petitioner's admission that the Sixth Circuit's standard for evaluating LRE cases is fully consistent with the letter and spirit of IDEA's LRE provision completely undermines the belated assertion that any degree of uncertainty or noncompliance exists in this area.

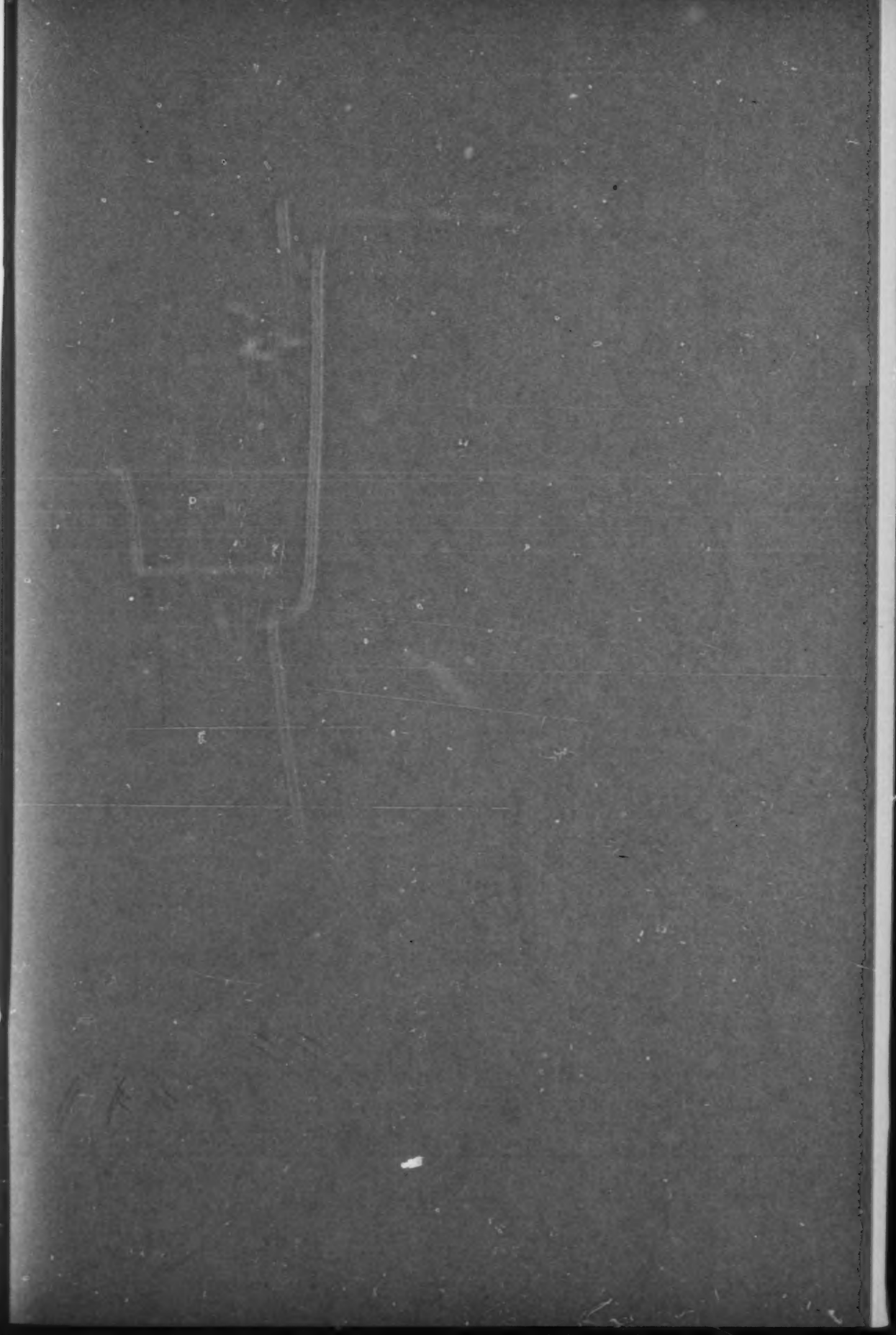
III. CONCLUSION

The District Court and the Court of Appeals followed IDEA, the administrative regulations and well-established precedent in this case, and concluded that the location of a disabled student's home school is only one of many factors that an IEPC should consider in determining the student's educational placement. They then turned to the undisputed record and concluded that, given the nature of Emily's disability and her goals and objectives, the LHO and SHO correctly held that Emily was properly placed by the IEPC in the School District's West Hills Middle School. There was no room under the law or the facts of this case for contrary conclusions. Therefore, the School District respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully Submitted,
KELLER, THOMA, SCHWARZE, SCHWARZE, DuBAY & KATZ, P.C.

By:_____
Robert A. Lusk (P38122)
Attorney for Respondent

Dated: August 25, 1997



APPENDIX A

INDIVIDUALIZED EDUCATION PROGRAM

STUDENT INFORMATION

Date of Meeting	Date of MET	Date of Psych.
4-14-94	4-13-94	3-24-94

Date of Last IEPC	Birthdate	C.A.
5-17-93	9-25-81	12-5

Sex	Grade	Soc. Sec. # (if available)
☐M ☒ F	6	374 06 3558

Student's Last Name	First Name	Initial
Hudson	Emily	

Student's Home Address	City		Zip Code
723 Fox River Dr.	Bloomfield Hills	Mi	48304

Home Telephone	Student Number
334-8414	0922670

Parent/Guardian/Surrogate Last Name	First Name
Hudson	Sharon

Native Language:
Parent English Student English

Parent/Guardian/Surrogate Address (if different than student's)

City Zip Code

Work Telephone	Resident District	Operating District
745-7525	Bloomfield Hills	Bloomfield Hills

Home School	Attending Building	Non Public
East Hills	WHMS	

Chapter I Eligibility ☐ Section 53 Eligibility ☐

PURPOSE OF THE IEPC

Purpose(s) of this Individualized Educational Planning Committee (IEPC):

☐ Initial IEP ☐ Annual Review
☑ Redetermination of Eligibility ☐ Other _____

PARENT CONTACT

Parent(s)/Guardian(s)/Surrogate(s) was contacted twice to ensure they have an opportunity to attend and to explain the purpose of the IEPC meeting and the roles of the participants. Additional contacts should be documented and attached to this IEP form.

By Beth Mueller Method of Contact IEP Invite
Date 3-28-94
By ATTORNEY's Method of Contact Phone
Date 3-94

IEPC MEETING PARTICIPANTS AND ATTENDANCE

Signatures of the following individuals indicate attendance at this IEPC meeting. Additional participant names should be documented and attached to this form. Participants who disagree with the IEPC's determination, may indicate the reasons on a dissenting report which may be attached.

Sharon R. Hudson
Parent(s)

William K. Filiatreau
District Representative/Designee

Margaret L. Hudson
Student

Harvey Burkhour -
Mich. Protection Advocacy
Other

Marcia Hauptman - School Psychologist
MET Representative

Donald M. Hillman
Other

Beth A. Mueller
Special Education Teacher

S. DiRezze (East Hills)
Other

J. Tack - para

Joe Michael
Regular Education Teacher

Beverly Gough, Speech/Language Para
Catherine M. Schneider, OTR
Other

Wendy Lane,
School Social Worker

Janette C. Gwinn,
Principal, WHMS

MET

For an initial or redetermination of eligibility IEP, the MET information was reviewed.

☑ Yes ☐ Attached ☐ Not applicable

ATTACHMENTS

STUDENT ELIGIBILITY

This IEPC determines this student to be ☑ Eligible as:
Trainable Mentally Impaired ☐ Ineligible

☐ Severely Mentally Impaired	340.1703
☑ Trainable Mentally Impaired	340.1704
☐ Educable Mentally Impaired	340.1705
☐ Emotionally Impaired*	340.1706
☐ Severely Language Impaired	340.1756
☐ Hearing Impaired	340.1707
☐ Visually Impaired	340.1708
☐ Physically or Health Impaired	340.1709
☐ Speech & Language*	340.1710
☐ Preprimary Impaired	340.1711
☐ Learning Disabled*	340.1713
☐ Severely Multiply Impaired	340.1714
☐ Autistic Impaired	340.1715

**Check sub paragraphs of the rule criteria which apply:* ☐ a ☐ b ☐ c ☐ d ☐ e ☐ f ☐ g

Student Name: Emily Hudson

Date of Meeting: 4-14-94

LEAST RESTRICTIVE ENVIRONMENT (LRE) CONSIDERATIONS

Is this student attending the school he/she would if not disabled? ☐ Yes ☑ No, explain: Emily will be attending West Hills MS which provides the support of the basic classroom, not available in her home school (East Hills MS)

Is the recommended placement in a school with students who are not disabled? ☒ Yes ☐ No, explain:

What supplemental aids and services were considered before the student was recommended for this placement? Appropriate paraprofessional support, technological support, and appropriate instructional materials.

What supplemental aids and services would be necessary to enable the student to participate in general education programs? Modified lessons, support of basic classroom teacher and staff, available technology when necessary to ensure success.

Provide the reason other least restrictive environment options, including aids and services described above, are rejected: Student will benefit more from setting of basic classroom, and the support the basic classroom can provide to the general education program.

Indicate the activities in which the student will participate with students who are not disabled (i.e. academic, nonacademic, and extracurricular) Extracurricular activities, lunch, and activities provided through general education classes.

STUDENT'S PLACEMENT

Categorical Program

☐ R340.1738 - SMI	☐ R340.1740 - EMI
☐ R340.1742 - HI	☐ R340.1744 - POHI
☐ R340.1748 - SXI	☐ R340.1756 - SLI
☑ R340.1739 - TMI	☐ R340.1741 - EI
☐ R340.1743 - VI	☐ R340.1747 - LD
☐ R340.1754 - PPI	☐ R340.1758 - AI

☐ MSD
☐ MSB

For MSD and MSB use procedures for placement as indicated in R340.1742 and R340.-1743.

Is secondary program departmentalized? ☐ Yes ☑ No

Hours/Periods Per Day/Week: 14 hrs. 45 min. Proposed Initiation Date: 1st day of school '94 - '95 Duration: 6/95 (last day of school year.)

If the above categorical program does not correspond with the student's eligibility, the IEPC must provide a rationale. The rationale is: This catagorical program meets the needs of the student.

This placement can only occur if the parent/guardian/surrogate gives consent to the cross categorical placement (page 5).

* * *

	Frequency	Duration *(mo/day/yr. or one school year)*
* Occ. Therapy R340.1701a(h)		Consultation 30 minutes/x month – school yr.
Phys. Therapy R340.1701a(m)		
Work-Study R340.1733m		
Audio Services R340.170fc(i)		
Orien. & Mobil. R340.1743(1)(b)		
* School SW R340.1701(b)	30 min/wk.	direct & consult
Teacher Consultant R340.1749		
School Psy. R340.1701		
Sp. & Lang. R340.1745		Consultation services, up to 30 weekly per Language Rating scale
Home/Hosp. R340.1746		
Non-Clrm. PPI R340.1755		
Pre Voc. Ed. R340.1701a(o)		
Voc. Ed. R340.1701b(j)		
Other *(specify)*		

*excluding holidays and vacations

Transportation: Is specialized transportation required?
☐ No ☒ Yes, provided by: Bloomfield Hills Schools

Special Requirements: _____

Physical Education: ☑ Regular ☐ Special (must have goals and objectives) ☐ Completed ☐ Other:

Total Hours in School Week 30 Total Hours in Special Education *16.15 Total Hours in General Education 13.45

* This includes ancillary services.

Student Name: Emily Hudson

Date of Meeting: 4-14-94

CONSIDERATIONS FOR SECONDARY STUDENTS

Prevocational/Vocational:

Student is younger than age 12, so this section is:
☐ Not applicable

Prevocational/vocational education was considered at age 12: ☑ Yes *

Is student enrolled in vocational education? ☐ Yes ☑ No

If yes, date vocational evaluation was completed:
____ / ____ / ____

(Evaluation must be on file for review)

* Not discussed at the I.EP.

What vocational alternative was determined appropriate:
☐ Regular Vocational Education
☐ Adaptive Vocational Education
☐ Special Education Vocational Education
☐ Individualized Vocational Training
☑ Not applicable

*Not discussed at the IEP.

Work-Study: (Student must have completed vocational education.) Work-study is determined to be appropriate: ☐ Yes ☑ No * If yes, a work-study plan must be completed and on file.

Transition: A statement of transition services needed (required at age 16, younger if appropriate).
☑ Not applicable
Student's age at time of IEP is 12.6

* * *

Graduation Testing: Will the student be taking the general graduation test? ☐ Yes ☐ No ☑ Not applicable
Accommodations recommended? ☐ No ☐ Yes, please describe:

_____

IEPC exempts from general graduation testing? ☐ Yes ☐ No ☑ Not applicable (Not of age.)

Career/life goals: _____

Alternate assessment procedures and criteria: _____

_____

Student Name:	Date of Meeting:
Emily Hudson	4-14-94

Comments: Technological Assessment of Emily will be completed

- 'Circle of Friends' group will continue for Emily.
- A continued process for communicating and planning for Emily will be in place, as agreed upon by Mrs. Hudson and Emily's teachers.
- Current IEP will remain in effect until the end of the '93-'94 school year.

RESIDENT DISTRICT COMMITMENT

Student is attending program in our district, and the resident district superintendent/designee:

- ☒ agrees with the IEP and its implementation
- ☐ gives authorization for operating district to conduct post-IEPCs and a contract is on file.
- ☒ does not agree with this IEP and requests an impartial due process hearing under R340.1724.

Signed Janette C. Gwinn — Date: 4-14-95
Superintendent or Designee — month/day/year

OPERATING DISTRICT COMMITMENT
(to be used when authorized)

Student is attending program outside of resident district and the operating district superintendent/designee:

- ☐ agrees to provide the post-IEPC program/service and a contract is on file.
- ☐ agrees to conduct post-IEPCs.
- ☐ does not agree with this IEP and requests an impartial due process hearing under R340.1724.

Signed: _____ Date: _____
Superintendent or Designee — *month/day/year*

PARENT/GUARDIAN/SURROGATE CONSENT

As the Parent/Guardian/Surrogate, I:

- ☐ have read this report and understand its contents.
- ☐ have received and been informed of all procedural safeguards.
- ☐ agree to the placement in a cross categorical program (page 3).
- ☐ agree and request implementation of the Individualized Education Program determined by this committee.
- ☐ do not agree with this report but will accept the implementation of the Individualized Education Program determined by this committee.
- ☒ do not agree with this report and request an impartial due process hearing pursuant to R340.1734. expected to be completed within 45 days (calendar days) of this date.

Signed: Sharon R. Hudson — Date: 4/14/94
Parent/Guardian/Surrogate — *month/day/year*

Parent/Guardian/Surrogate signatures is required for initial placements.

Student Name: Emily Hudson

Date of Meeting: 4-14-94

CONFIRMATION OF NOTICE OF LOCATION OF PROGRAMS AND SERVICES

The superintendent or designee of the operating district assures that:

To the maximum extent appropriate, the student will be educated with persons who are not handicapped.

If this assignment is to a special class or separate school, that the nature and severity of the handicap and the use of supplementary aids and services were considered.

If this assignment is to a special class or facility, that it is as close as possible to the student's home.

In making this assignment, consideration was given to the accessability of physical facilities, socially accepting environments, and to any potentially harmful effects to the student or the quality of services which the student needs.

Each student who is handicapped will be given the opportunity to participate with nonhandicapped persons in nonacademic and extracurricular activities and services.

Program: Basic classroom w/mainstreaming

Location (building) of program(s)/service(s): West Hills Middle School

Operating district: Bloomfield Hills

Person responsible for implementation: Basic Classroom Teacher

*Actual implementation date: 1st day of school, '94-'95 school year.

Concluding date: 6/95 – last day of school '94 - '95 school year.

*All programs and services begin on this date and follow the established school calendar unless otherwise noted in this IEP.

Signed: Janette C. Gwinn
Superintendent or Designee

Date: 4-14-94
month/day/year

GOALS AND OBJECTIVES
(more than one page may be necessary)

☐ Appropriateness of the current IEP was reviewed by this committee

INSTRUCTIONAL AREA: Math

Present Level of Educational Performance: Emily can tell time to the hour & half hour. She knows the names of coins, but is not always accurate. She is not aware of when to use +, −, or x.

Annual Goal: Emily will apply mathematics to other life skills

Short-Term Instructional Objectives
(Minimum 2 objectives)

1) Emily will tell time to the nearest 5-minute interval.
   Evaluation Procedures: A, B, C
   Performance Criteria: 75% accuracy
   Schedules for Evaluation: B
   Status:

2) Emily will match money equivalents and add coin values.
   Evaluation Procedures: A, B, C
   Performance Criteria: 75%
   Schedules for Evaluation: B
   Status:

3) Emily will increase her ability to understand when to add, subtract or mult. & do so with a calculator (problem solving)
   Evaluation Procedures: A, C
   Performance Criteria: 60%
   Schedules for Evaluation: B
   Status:

INSTRUCTIONAL AREA: Written expression

Present Level of Educational Performance: Emily can express herself orally. She is able to dictate sentences & stories.

Annual Goal: Emily will use technology (Tape Recorder, computer) to communicate thoughts & stories.

Short-Term Instructional Objectives
(Minimum 2 objectives)

1) Emily will use a tape recorder to tell a story and a computer to write simple sentences and stories.
   Evaluation Procedures: A, B
   Performance Criteria: 60%
   Schedules for Evaluation: B
   Status:

2) Emily will work on keyboarding skills.
   Evaluation Procedures: A
   Performance Criteria: 60%
   Schedules For Evaluation: B
   Status:

3) Emily will write a simple sentence to express a complete thought.
   Evaluation Procedures: A, B
   Performance Criteria: 75%
   Schedules for Evaluation: B
   Status:

I. EVALUATION PROCEDURES
- A. Teacher Observation
- B. Written Exam
- C. Oral Exam
- D. Other _____

II. CRITERIA
- A. Accuracy (ex. 80%)
- B. Rate (ex. 4 out of 5 times)
- C. Production (ex. 3 times/hour)
- D. Achievement Levels
- E. Other _____

III. SCHEDULE
- A. Weekly
- B. Monthly
- C. Semester
- D. Card Marking
- E. Other_____

IV. STATUS
- A. Achieved
- B. In Progress
- C. Not Achieved
- D. No longer appropriate
- E. Other _____

GOALS AND OBJECTIVES
(More than one page may be necessary)

☑ Appropriateness of the current IEP was review by this committee

INSTRUCTIONAL AREA: Reading

Present level of Educational Performance: Emily currently reads at a 1-6 grade level

Annual Goal: Emily will increase her sight word vocabulary.

Short-Term Instructional Objectives
(Minimum 2 objectives)

1) Emily will improve her ability to pick the correct word to fit into a sentence.
   Evaluation Procedures: A, C
   Performance Criteria: 75%
   Schedules for Evaluation: B
   Status:

2) Emily will correctly define sightwords orally and in written form.
   Evaluation Procedures: A, C
   Performance Criteria: 75%
   Schedules for Evaluation: B
   Status:

INSTRUCTIONAL AREA: Reading Comprehension

Present Level of Educational Performance: Emily currently comprehends at a mid-second grade level.

Annual Goal: Emily will improve her comprehension skills.

Short-Term Instructional Objectives
(Minimum 2 objectives)

1) After reading a selection, Emily will be able to recall details from her reading.
Evaluation Procedures: A, B, C
Performance Criteria: 75%
Schedules for Evaluation: B
Status:

I. EVALUATION PROCEDURES
- A. Teacher Observation
- B. Written Exam
- C. Oral Exam
- D. Other _____

II. CRITERIA
- A. Accuracy (ex. 80%)
- B. Rate (ex. 4 out of 5 times)
- C. Production (ex. 3 times/hour)
- D. Achievement Levels
- E. Other _____

III. SCHEDULE
- A. Weekly
- B. Monthly
- C. Semester
- D. Card Marking
- E. Other_____

IV. STATUS
- A. Achieved
- B. In Progress
- C. Not Achieved
- D. No longer appropriate
- E. Other _____

GOALS AND OBJECTIVES

More than one page may be necessary)

☐ Appropriateness of the current IEP was reviewed by this committee

INSTRUCTIONAL AREA: Social/Emotional

Present Level of Educational Performance: Emily does not demonstrate age appropriate, conversational skills.

Annual Goal: Emily will learn appropriate, verbal and non-verbal ways of greeting and conversing with peers and adults in school.

Short-Term Instructional Objectives
(Minimum 2 objectives)

1) Emily will initiate appropriate greetings and conversing (verbal and nonverbal) with peers & adults.
   Evaluation Procedures: Teacher/social worker observation.
   Performance Criteria: 75% of time
   Schedules for Evaluation: Weekly
   Status:

2) When roleplaying, Emily will respond with appropriate conversation
   Evaluation Procedures: Teacher/social worker observation
   Performance Criteria: 75% of time
   Schedules for Evaluation: Weekly
   Status:

3) Emily will recognize when help is needed and identify effective ways to ask for help
   Evaluation Procedures: Teacher observation
   Performance Criteria: 50% of time
   Schedules for Evaluation: Monthly
   Status:

INSTRUCTIONAL AREA: Social/Emotional

Present Level of Educational Performance: Emily has difficulty with peer relations.

Annual Goal: Emily will improve her interpersonal relationships with peers

Short-Term Instructional Objectives
(Minimum 2 objectives)

1) Emily will identify and gain peer attention in a positive way
   Evaluation Procedures: Teacher/social worker observations
   Performance Criteria: Achievement levels (3 ways)
   Schedules for Evaluation: Monthly
   Status:

2) Emily will identify and display appropriate personal space
   Evaluation Procedures: Teacher/social worker observations
   Performance Criteria: 80% of time
   Schedules for Evaluation: Weekly
   Status:

3) Emily will reach out to a peer instead of an adult
   Evaluation Procedures: Teacher/social worker observation
   Performance Criteria: 50% of time
   Schedules for Evaluation: Weekly
   Status:

I. EVALUATION PROCEDURES
   A. Teacher Observation
   B. Written Exam
   C. Oral Exam
   D. Other _____

II. CRITERIA
   A. Accuracy (ex. 80%)
   B. Rate (ex. 4 out of 5 times)
   C. Production (ex. 3 times/hour)
   D. Achievement Levels
   E. Other _____

III. SCHEDULE
   A. Weekly
   B. Monthly
   C. Semester
   D. Card Marking
   E. Other _____

IV. STATUS
   A. Achieved
   B. In Progress
   C. Not Achieved
   D. No longer appropriate
   E. Other _____

GOALS AND OBJECTIVES

(more than one page may be necessary)

☑ Appropriatness of the current IEP was reviewed by this committee

INSTRUCTIONAL AREA: Speech and language

Present Level of Educational Performance: Expressive language delay – delay in the pragmatics and syntax base

Annual Goal: To improve expressive language

Short-Term Instructional Objectives
(Minimum 2 objectives)

1) To understand posessive pronouns and use appropriately in Conversational speech.
   Evaluation Procedures: A/B/C
   Performance Criteria: 75%
   Schedules for Evaluation: annual
   Status: ongoing

2) To understand and use "Wh" questions: who/what/when/where/why
   Evaluation Procedures: A/B/C
   Performance Criteria: 75%
   Schedules for Evaluation: annual
   Status: ongoing

3) To improve verb concepts
   Evaluation Procedures: A/B/C
   Performance Criteria: 75%
   Schedules for Evaluation: annual
   Status: ongoing

INSTRUCTIONAL AREA: Speech/Language

Present Level of Educational Performance: see above

Annual Goal: Expressive language delay

Short-Term Instructional Objectives
(Minimum 2 objectives)

1) To further develop vocabulary strategies
   Evaluation Procedures: A/B/C
   Performance Criteria: 75%
   Schedules for Evaluation: annual
   Status: ongoing

I. EVALUATION PROCEDURES
   A. Teacher Observation
   B. Written Exam
   C. Oral Exam
   D. Other _____

II. CRITERIA
   A. Accuracy (ex. 80%)
   B. Rate (ex. 4 out of 5 times)
   C. Production (ex. 3 times/hour)
   D. Achievement Levels
   E. Other _____

III. SCHEDULE
   A. Weekly
   B. Monthly
   C. Semester
   D. Card Marking
   E. Other_____

IV. STATUS
   A. Achieved
   B. In Progress
   C. Not Achieved
   D. No longer appropriate
   E. Other _____

April 15, 1994

Dear Mrs. Hudson:

Enclosed is Emily's IEP. Because you indicated a need to sign the document prior to completion of the IEP, we have enclosed your copy of the completed document.

If we can be of assistance, please feel free to call.

Sincerely,

/s/ Janette C. Gwinn
Janette Gwinn,
West Hills Middle School Principal

INVITATION TO ATTEND TWE INDIVIDUALIZED EDUCATIONAL PLANNING COMMITTEE MEETING (IEPC)

[LOGO] Rule #340.1721c

To the Parent(s) of Emily Hudson Date 3-28-94

Address: 723 Fox River Drive Bloomfield Hills, Mich., 48304

You are invited to attend an Individualized Educational Planning Committee (IEPC) meeting for your child. This meeting is convened for *(check one)*:

☐ Initial IEPC

Determining eligibility for special education services and/or placement in appropriate program; if identified as handicapped, complete an Individualized Education Plan (IEP).

☑ IEP Review

Reviewing present levels of performance and the services and curriculum plan your child has worked with and to identify programming needs for the new IEP *(required every 12 months).*

☐ Redetermination of Eligibility and IEP Review

Review of Multidisciplinary Evaluation Team (MET) report, review of goals and objectives of the present IEP, determination of eligibility, and identifying program and service needs for the new IEP *(required every 36 months).*

☐ Other _____

☐ Transition Plans will be considered at this IEP.

■ The Case Coordinator will contact you to explain the purpose of this meeting and the responsibilities of each participant. ■

The meeting is scheduled for:

Thursday, April, 14 at 1:30 pm at West Hills MS
Date *Time* *Place*

■ *If for some reason this date, time or place is not acceptable to you, or if you have questions about this meeting, please contact me at the number below.* ■

The following people have been invited to attend this meeting and have received a copy of this letter:

(Name)

	General Education Teacher
Beth Mueller	Special Education Teacher
Wendy Lane	MET Representative
	School Administrator
	Other *(Title)*
Marcia Hauptman	School Psychologist
Bev Gough	School Social Worker
	Speech/Language Pathologist
	Work-Study Coordinator
	Student *(if appropriate)*

Please note that other persons at the discretion of the parent or public agency may be invited to attend the IEPC, including a representative of the resident district if different from the operating district. R340.1721b(4). Thank you for your interest and participation.

Beth Mueller (932-6100)
Name/Title/Telephone – Case Coordinator
Learning Center Teacher

cc: Sharon DeRezzie, D. Hillman, B. Filiatreau, J. Gwinn, M. Kozek, M. Palermo, East Hills Teachers, C. Schneider, R. Berry, J. Gerrick

* *

Please detach and return to the Case Coordinator *(if we do not receive a reply, the meeting will be held as scheduled).*

Student's Name: Emily Hudson

☑ Yes, I will attend the Individualized Educational Planning Committee (IEPC) meeting as scheduled. Fortunately, the time you have scheduled will fit into my work schedule.

☐ No, I will not be able to attend. Please forward a copy of the outcome of the meeting for me to review and approve.

Signature of Parent/Guardian: Sharon R. Hudson
Date: 3/31/94

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 94-74636
Hon. Gerald E. Rosen

EMILY HUDSON, by an through her
Parent, Sharon Hudson

Plaintiff,

v.

BLOOMFIELD HILLS PUBLIC SCHOOLS

Defendant.

Stewart R. Hakola (P37952)
Attorney for Plaintiff
Michigan Protection & Advocacy Service
315 South Front Street
Marquette MI 49855
(906) 228-5910

Robert A. Lusk (P38122)
Attorney for Defendant
Bloomfield Hills School
District
Keller, Thoma, Schwarze,
Schwarze, DuBay & Katz, P.C.
440 East Congress, 5th Floor
Detroit, MI 48226
(313) 965-7610

John L. Gierak (P26863)
Co-Counsel for Defendant
Bloomfield Hills
School District
801 West Big Beaver Road
Fifth Floor
Troy, MI 48084-4767
(810) 362-1300

PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

* * *

[2] Emily has attended a "split program" for the last two school years in which she participated in both the West Hills and East Hills schools. In the 1994-95 school year, for example, Emily attended the West Hills special education classroom from 8:30 AM until 10:40 A.M., then was transported to East Hills for the remainder of the school day. * * *

* * *

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LC No.: 94-74636

COA No.: 96-1005

EMILY HUDSON, by and through
her parent, Sharon Hudson,

Plaintiff - Appellant

v.

BLOOMFIELD HILLS PUBLIC SCHOOLS,

Defendant - Appellee

MICHIGAN DEPARTMENT OF EDUCATION,

Defendant.

On Appeal From The United States District Court
For The Eastern District Of Michigan,
Southern Division

BRIEF OF APPELLANT

Attorney for Appellant
Stewart R. Hakola
Michigan Protection & Advocacy Service
315 South Front Street
Marquette, MI 49855
(906) 228-5910

* * *

[11] Emily attended the West Hills special education classroom the past two school years from about 8:30 until 10:40. (R. 26: Pl. Mot. S.J., attach. Mueller dep., p. 5.) During that time, Emily engaged in group work and also worked individually with Ms. Mueller or with an aide, because Ms. Mueller has a planning period during this time. *Id.*, pp. 7, 9. During the time Emily was present in the classroom, other students would leave to attend other classes, sometimes distracting Emily. *Id.*, pp. 9-10.

* * *

[14] * * * In *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983), this Court addressed this "least restrictive environment" policy of the IDEA and established standards for determining such cases. Although *Roncker* has been criticized by subsequent federal circuit courts for departing from the plain language of Section 1412(5)(B), it nevertheless can be reconciled with the statutory and regulatory standards outlined above.

[15] To begin with, *Roncker* is cognizant of core Congressional policy, finding that placement in the least restrictive environment is a "very strong congressional preference." *Id.* at 1063. More specifically, the standards developed in *Roncker* can be reconciled with the language of the regulatory scheme, as they address the same types of considerations: can the child, with the help of support services which can feasibly be provided, achieve benefits in the less restrictive environment without disrupting the education of others?

* * *

[21] Although other federal circuits have decided to not adopt the *Roncker* test, it has proven to be an adaptable tool, as its standards are flexible enough to extend

to new factual situations in which one party is seeking an educational placement in regular education. "Least restrictive environment" (LRE) generally means the proposal for the child which includes more time in regular settings, whether it means having the child attend special classes in a regular education building or having the child spend more time in regular classes themselves.

Thus, a wide variety of LRE cases can be brought within the *Roncker* framework. The *Roncker* test for deciding these cases essentially is that the child must be placed in the less restrictive environment, including in regular education, unless one of three exceptions are met:

1. The child will not benefit.
2. The "marginal" benefits to the child are "clearly outweighed" by the advantages of the more restrictive placement *and* the services which provide these clear advantages cannot feasibly be provided in the less restrictive setting.
3. The child is a disruptive force in the less restrictive setting.

These standards, consistent with Congress' strong preference, limit the removal of children with disabilities from the regular education environment. Emily is not a child who falls within these exceptions. First, her documented benefits from regular education have been significant. Second, the purported advantages of the school's more restrictive placement – a certified special education teacher, concrete teaching materials, availability of a speech therapist and social worker – can be and have been easily provided at East Hills. Third, there is no evidence that Emily's presence in regular classes disrupts the education of others.

* * *

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 94-74636
Hon. Gerald E. Rosen

EMILY HUDSON, by and through
her Parent, SHARON HUDSON,

Plaintiff,

vs.

BLOOMFIELD HILLS PUBLIC SCHOOLS,

Defendant.

MICHIGAN PROTECTION
& ADVOCACY SERVICE
By: Stewart R. Hakola
(P-37952)
Attorney for Plaintiff
315 S. Front Street
Marquette, MI
49855-4644
(906) 228-5910

KELLER, THOMA,
SCHWARZE, SCHWARZE,
DuBAY & KATZ, P.C.
By: Robert A. Lusk
(P-38122)
Attorney for Defendant
Bloomfield Hills
School District
440 E. Congress, 5th Floor
Detroit, MI 48226
(313) 965-7610

AFFIDAVIT OF
DR. WILLIAM K. FILIATREAU

STATE OF MICHIGAN)
) SS.
COUNTY OF OAKLAND)

DR. WILLIAM K. FILIATREAU, being first duly sworn, deposes and states:

1. That he is employed by the Bloomfield Hills School District as its Director of Special Education.

2. That he is familiar with Emily Hudson's Individualized Education Plan (IEP) dated April 14, 1994.

3. That Emily's IEP calls for her placement in Ms. Beth Mueller's classroom at West Hills Middle School, the Learning Center, for 14 hours and 45 minutes each week.

4. That Emily's IEP also calls for her to receive the following ancillary services at West Hills Middle School: consultative and direct social work services, 30 minutes a week; consultative occupational therapy services, 30 minutes a month; and, consultative speech and language services, 30 minutes a week.

5. That the School District would incur $3,500.00 in costs for materials and equipment to outfit a classroom at East Hills Middle School to make it comparable to the Learning Center.

6. That, on an annual basis, the School District would incur approximately $30,000.00 replicating the services Emily receives at West Hills Middle School at East Hills Middle School. These costs break down as follows:

A. One part time special educatin teacher, $21,-000.00

B. One part time paraprofessional, $5,402.88

C. One part time speech and language teacher, $864.00

D. One part time social worker, $864.00

E. One part time occupational therapist, $216.00

7. That the School District has eleven other students currently assigned to the West Hills Learning Center.

8. That, if the other students assigned to the Learning Center insisted on having their IEPs implemented in their home schools, the School District would incur considerably more costs and expenses than those estimated in paragraphs 5 and 6 above.

9. That if called as a witness he would competently testify to the facts set forth herein from personal knowledge.

/s/ William K. Filiatreau
Dr. William K. Filiatreau

Subscribed and sworn before me
this 1st day of August, 1995.

/s/ Judith J. Brandon
Notary Public, Oakland County, MI
My commission expires: 1/31/98